In the Supreme Court of the United States.

OCTOBER TERM, 1899.

HENRY L. MITCHELL, GOVERNOR OF the State of Florida, et al., trustees of the internal improvement fund of the State of Florida et al., appellants, v. CHARLES M. FURMAN ET AL., appellees. } No. 158.

REPLY OF APPELLANTS TO BRIEF OF COUNSEL FOR APPELLEES.

Appellees say there are no authorities that hold a survey of lands (under the public land laws) to be prima facie evidence of title (p. 4, brief).

We contend the authorities are both many and convincing. We cite—

United States v. *de Repentigny*, 5 Wall., 211, text, p. 268 (18-646).

McMicken v. *United States*, 97 U. S., 204, text, p. 218 (24-952).

Mitchell v. *United States*, 9 Pet., text, pp. 743-744.

Nofire v. *United States*, 164 U. S., 660.

The brief, page 8, states there is no allegation in the bill of complaint to sustain the ground of demurrer; that the bill disclosed the matters sought to be determined were still pending before the land department.

The following is the allegation of the bill: "That entries of such selections have been allowed by the Commissioner of the General Land Office of the United States, and the same are held to be patented to the State" (p. 5 of Record).

Appellees contend it does not appear by the bill that the lands had not been surveyed as a Spanish grant. (Brief, p. 9.)

The bill describes the lands patented and selected by lots and quarters of quarter sections (pp. 3 to 5 of record). This court will take judicial notice that in the survey of lands as a private grant, there are no quarter sections and lots, but the tract is surveyed as one section and numbered above No. 36. Appellees say defendants, in the court below, failed to object in time to the reference of questions of law to the master. (Brief, p. 11.)

The following, from page 151 of record, shows the objection was made in time:

> Before going into the testimony on behalf of defendants, solicitor for defendant gives notice that he, being of the opinion that the court has no power to appoint a master with power to make return of his findings upon the law, as well as the facts, in cases of this character, hereby gives notice that before the master shall make his report he will call the matter to the attention of the court for its decision.

The court decided the reference proper, and appellants have assigned this decision for error.

Appellees contend that if the title papers showed the grant merely a concession, they were yet evidence of title to that extent (p. 15 of brief).

The moment it appeared to the court that complainants held under an inchoate title, that moment it was apparent that the court had no jurisdiction to consider it, and it was not evidence for any purpose whatever.

Burgess v. *Gray*, 16 How., 48 text, p. 62.
United States v. *King*, 3 How., text, p. 787.
Menard v. *Massey*, 8 How., text, 307.
De la Croix v. *Chamberlain*, 12 Wheat., 599.

Appellees contend that the severance of the left-hand half of the sheets, pages following pages 15 and 18, respectively, of the title papers, evidences good faith and was done to prevent interpolation. (Brief, pp. 15 and 16.)

The diagram shown on page 17 of brief reverses the position of the severed part from the left to the right hand side of the sheet, and hence does not correctly delineate the severance. On pages 321, 323, 325, 339, 340 of the Record appear copies of original Spanish documents whereon the orders of the governor are written on the left-hand third of the sheet. It is difficult to understand how the severance of this part of the sheet could be evidence of good faith if it was the custom and practice to make indorsements upon that part of the sheet, and such custom is well established, and not denied.

Appellees in their brief, pages 16, 17, maintain it was no error to reject the testimony of Dunham, county

clerk, because the county judge has the custody of the probate records.

This might be ground to refuse to admit the copy certified by the county clerk if this objection were not otherwise shown to be untenable, but the evidence rejected was the testimony of Dunham proving the copy by evidence of comparison with the original record. Any witness was competent to prove the copy by examination and comparison. (1 Green. Ev., sec. 508.)

Appellees, on page 27 of their brief, have fallen into error as to the translation of Fretot., page 285 of Record, substituting the word "then" for "thus." But we do not depend on the translation. The Spanish is printed in the record, page 272. It reads: "Vistos: Traslada á Dⁿ José Fish, así lo provefo y mando."

Así in Spanish may not be translated "then." It means "so," "thus."

Further, in the next paper in the "expediente," the petition of Fish to be granted the lands as a new settler, he says "the public proceedings should be delivered to to me in order to answer the copy which was given me of the representation of the fiscal," page 285, Record.

The fact is, at this day no one knows absolutely what was done or intended to be done in these proceedings, even conceding the papers are genuine, and this emphasizes the wisdom of Congress in requiring all title papers to "be received and adjudicated" by a court, while there were living those who were familiar with the practices under Spain.

As to the Spanish custom of recording real or royal titles, appellees have deserted their position in the lower

court. They admit on page 28 that grants that had fully matured were bound in books.

The master says this is a mere assumption (p. 74 of Record).

Appellees now contend because their title papers are stitched together they are bound, as were the grants that had fully matured, but they ignore the facts set out in the report of the register and receiver, that the records of complete titles were not only stitched together, but stitched together with all the records closely following each other, so as to make it extremely difficult to interpolate a grant (p. 170 of Record).

At every ten sheets of paper on the small books which he (the escribano) made there was a blank sheet left, on which the escribano made an index of the grants *that preceded that sheet*, and when he had enough of these sheets or small books they were bound into large books, and these indexes taken out and a general index made of the whole book Testimony of Alvarez (p. 166 of Record). The title papers offered by appellees were 21 pages stitched together and numbered No. 17, found in a bundle marked "Memorials and concessions of land" (p. 216 of Record).

Appellees contend the lists of complete titles furnished the Government by Alvarez and printed in vol. 8 of American State Papers, pages 261 to 266, is not evidence against their claim, because they do not claim under the royal order of 1790, nor under that of 1815 (p. 37 of brief). To that there are several answers.

First. No other authority for the grant of land to Fish is shown except these two royal orders, and the land

commissioners in reporting on it gave the order of 1790 as the law under which the grant was made.

Second. After Quesada had denied Fish's petition to be declared owner of any lands with his purchase of the trees, etc., at auction. (See pp. 280, 282, 285 of Record.) Fish then as a new settler prays a grant (p. 235 of Record). In all the cases a petition as a new settler is deemed to be a petition under the order of 1790. The fiscal says the governor may grant land to Fish as a new settler (p. 282 of Record). Morales says he grants to him as a new settler (p. 290 of Record).

Third. The lists printed contain *all the royal titles issued* under whatever royal authority issued. R. K. Call, the special consul appointed under the act of 1828, so reports in 1835. See vol. 8 American State Papers, p. 251 (G. & S. ed.).

Alvarez testified in answer to the question:

> "Are you acquainted with *all* the royal titles granted by Spanish governors of this province for lands to individuals?"
>
> Answer. *All* the royal titles exist in my office. I am acquainted with them in that way. I know they are in my office.
>
> Question. Were not all the royal titles granted under the royal order of 1790 and 1815?
>
> Answer. Yes. (See p. 170, vol. 8, American State Papers, also p. 157 of Record.)

Appellees show that grants were made "at a place called Tocoy," etc., and argue that the grant to Fish was with like designation (p. 30 of brief).

There is a wide difference between a grant at a place called "el Vergel" and a grant *of* the place called "el

Vergel." (See pp. 278, 283, 287, 141 of Record, for the translations; pp. 265, 270, 273, the Spanish.)

Appellees say there are various instances of head-right grants and grants on other conditions, and cite cases (p. 37 of brief).

Appellants have never denied the proposition, but say in all such cases there existed reasons for making the additional grants. The cases cited are in point.

George Fleming was given a grant as a new settler for 1,000 acres under the royal order of 1790. See volume 4, page 313, American State Papers (G. & S. ed.). Also a grant for 20,000 acres under the royal order of 1815 for services. See the real title, page 839, volume 3, American State Papers (G. & S. ed.). In each grant and real title the royal order is recited.

So also Charles Seaton was granted 1,400 acres under the royal order of 1790 and 600 acres under the royal order of 1815 for services as an officer in the militia, and 16,000 acres also under the royal order of 1815 for the benefit to accrue to the province from the erection of a sawmill, and in each grant was recited the grounds for making it. (See 12 Peters, p. 486.)

So of any and all grants that may be cited; they will be found to have been made under one or the other of the orders of 1790 or 1815.

Appellants contended, not that Fish could not have two grants, but that he could not have two grants as a new settler.

The master sought to overcome this difficulty by holding that Fish held title to Anastasia Island by reason of

his purchase at the auction sale, and that all other proceedings were but a continuation of the sale. (See pp. 67 and 68 of record.)

This contention appellees now desert, and admit that the alleged grant is upon Fish's "amended" petition (p. 31 of brief); but if on the amended petition, how avoid the conclusion that it was prayed for as a new settler?

Appellees still continue to insist, as reported by the master, that the grants to Rodriguez and Sanchez of parts of the lands alleged to have been granted to Fish are not evidence against the validity of the Fish grant, and say each of said grants was a concession (p. 37 of brief).

As shown to the master, the Rodriguez grant was perfected into a complete title in 1805, and Governor White, who made it, is reputed to have been the most careful and strict of the Spanish governors. See volume 3, page 794, American State Papers (G. & S. Ed.). See list of complete titles, page 162 of Record. The Sanchez grant was a concession, but the record shows that in 1802 the lands were vacant, hence the *title* was not granted to Fish in 1795 (p. 341 of Record).

Appellees attempt to controvert the evidence of Alvarez and the report of R. K. Call, that the largest grant made prior to 1816 that was perfected into a complete title was to McQueen, 3,275 acres (pp. 157 and 168–220 of Record), and they cite the Fates grant of 10,000 acres.

The Fates grant was an English grant, and was recognized by Spain in accordance with the treaty of 1783 between Spain and Great Britain. See volume 4, Ameri-

can State Papers, page 381 (G. & S. Ed.). It was confirmed upon a survey made in 1791 by order of the Spanish governor.

Appellants have not contended, as stated in appellees' brief, page 38, that there could not be a grant on Amelia or Anastasia Islands. They contended that if the whole of Anastasia Island was private property in 1822, Governor Coppinger would not have included it among the public domain, as he did in his letter to Colonel Butler (p. 152 of Record).

Appellees have again fallen into error on page 39 of brief, in stating that the coast survey map shows the old Spanish fort at Matanzas to be on the west side of the river.

Governor Cespedez reports to the King on the subject of the island of Santa Anastasia, and in that report, dated 1786, he says: "On the inside of the bar at Matanzas there is a round tower, which in flood tides is surrounded by sea water. It is guarded by a detachment of six soldiers, a corporal, and sergeant" (pp. 347 and 348 of Record).

Appellees declare appellant in error in contending that all complete or perfect grants (titles) must be preceded by a document styled a concession. (P. 41 of brief.)

They admit that under the royal order of 1790 such was the rule. Even this admission is contrary to the report of the master. He says, nowhere is found any set form of a Spanish grant. (P. 70 of Record.)

We contend, that in every case where a real or royal title exists it is preceded by a concession, or an order that is declared shall serve as a title in form, and we

challenge examination of the entire list printed in vol. 8, American State Papers, pages 261 to 266, for a single complete title issued without the first concession preceding it. (2 White's Recompilacion, p. 282, Record, p. 220.)

Appellees cite *Clarke's Case* (8 Pet., 467), but the grant which constituted the foundation of the claim purported to be a royal title and had the form of a royal title, was in the name of the King and by his authority, and was preceded by the first concession. (See pp. 440 to 443, 8 Pet.)

Appellees say, on page 42 of brief, the grant (to Fish) was of the whole island.

Certainly they do not find it in the record. The paper purporting to be a grant by Morales does not mention the word "island," but says he (Fish) claimed a possession at the place named "The Vergel." (P. 290 of Record.)

On page 45 of brief they admit that there was sold at the auction sale in 1792 "the place called "El Vergel."

The place called "El Vergel" could not have been Anastasia Island, which, by the report of Governor Cespedez in 1787, was shown to be well known by its name.

But appellees say the proceedings were an adjudication of the rights of Fish as heir and purchaser of his father's estate. (P. 45 of brief.)

What then must be said of the reports to Quesada by Ortega (p. 279 of Record), and of Zamorano (p. 282 of Record)?

As to the long possession of Fish, set out on page 46 of brief, it is sufficient to say that there is no evidence

that he possessed other than the place called "El Vergel," and that this did not embrace Anastasia Island is proved by the grants to Rodriguez and Sanchez and the report of Governors Cespedes and Coppinger. Governor Quesada says the title under which he possessed it (the place called El Vergel) does not appear (p. 283 of Record). In the deed to Cintra (Record, p. 365) it is said "there remained to Fish a quantity of cultivated land called El Vergel." On page 486, vol. 4, A. S. P. (Duff Green Ed.), it is translated "a piece of cultivated land" (p. 729, Gale & Seaton edition). The Spanish is "una porcion de tierra cultivada titulada el Bergel" (pp. 362–363 of Record).

Appellees contend the word "claims" as used in the act of 1828 refers to inchoate titles (p. 54 of Brief). It is sufficient to say all the acts from 1822 to 1830 must be construed in pari materia. (*United States* v. *Arredondo*, 6 Peters, 720.) That the word "claims" in all the acts refers to complete as well as inchoate titles can not be successfully denied. See *United States* v. *Arredondo*, 6 Peters, text, pp. 720 to 723, where this court expressly declares its duty to adjudicate titles valid by the law of nations (complete titles) and designates them as "claims."

Appellees say the act of 1828 was passed before this court had declared the Florida treaty self-operating, and if Congress did intend the act to apply to complete titles it was under an erroneous impression that all grants required confirmation (p. 54 of brief).

If Congress intended the act to apply to all grants, how can this court go beyond and contrary to the direction of the political department of the Government and

exempt any class of titles? We contend it is not possible to assume that this court will go contrary to the declared intent of Congress in such a matter. Further, one branch of Congress passed upon the treaty, and it may be presumed that no law was enacted without a knowledge of what the treaty required.

Appellees account for the many cases of complete titles adjudicated by this court under the act of 1828 by the fact that the suits were begun prior to the construction of the eighth article of the treaty by the court (p. 56 of brief).

Pray what was to hinder a dismissal of all appeals taken to decisions against the validity of the grant made by the lower court as soon as this construction was made known—that is, in 1832 and 1833?

Is it possible to suppose Mr. Webster, Mr. Berrien, Mr. Ogden, and Mr. White would have failed to dismiss the case of *Mitchell* v. *United States* (15 Pet.) prior to 1841 if appellees' contention was tenable?

Appellees contend that there was such a distinction between the Florida treaty and the treaties under which Louisiana and California were acquired that the ruling of the court in *Botiller* v. *Dominguez* (130 U. S., 238) does not apply to Florida grants. In other words, they undertake to make a distinction between the Florida and Louisiana grants as to the right of the owners to maintain suit upon their complete titles without a confirmation of the grant by Congress (pp. 56 and 57 of brief).

This court, in *Ainsa* v. *New Mexico and A. R. Co.* (No. 1, October term, 1899), places grants in Louisiana and Florida in the same category as to the right and power

of the grantee to sustain complete titles in the courts, and both in the same category with grants under the treaty of Guadalupe Hidalgo. Such right as to Florida grants existed until prohibited by the act of 1828 as to grants in excess of a league square, and such prohibition was upon grounds of public policy.

In *Botiller* v. *Dominguez* the court held that the act of March 3, 1851, required each and every person claiming lands in California by virtue of any right or title derived from Spain or Mexico to present his claim to commissioners, and that there was no exception made by the law and the court could make none.

So of the acts of 1828 and 1830.

The court says in *Ainsa* v. *Railway Company:* "Even grants which were complete and perfect at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they can be held valid. *But where no such proceedings are expressly required by Congress* the recognition of grants of this class in the treaty itself is sufficient to give them full effect."

That expresses appellant's contention from the beginning. Congress deemed it necessary, and it was necessary, that the validity of the title papers of all the larger grants claimed in the territory ceded by Spain should be examined and adjudicated by a court, and the extent of the boundaries ascertained and determined. Hence the act of 1828 and the bar contained in section 12 of that act.

This court says, in *United States* v. *Forbes* (15 Pet., 182), "All the public domain of Spain was ceded to this Government by the treaty of cession and the title in fee to

the same vested in the United States. From the lands thus acquired was excepted individual property.

First, the paper title to such *private property* it is our duty to investigate and ascertain, and by our decision to establish; and second, it is our duty to ascertain and cause to be surveyed and marked by definite boundaries the lands granted. (*United States* v. *Forbes Heirs*, 15 Pet., text 182.)

It was not individual or private property until the complete title was issued. (*De la Croix* v. *Chamberlain*, 12 Wheat., 599.)

It is somewhat surprising, in view of the grounds of the motion to dismiss the case, to find that appellees go into argument to show that the acts of 1828 and 1830 are unconstitutional (pp. 60 et seq. of Brief), as also their argument upon the construction of the treaty of 1819 (pp. 49 et seq. of Brief).

Appellees misstate the position of appellants as to the effect of the decision of the Land Department (p. 62 of Brief).

Appellants admit the judicial power to correct mistakes in the adjudications made by the Land Department, but claim such mistakes must be of law, and such mistakes of law must be averred in the bill and proved at the hearing.

Appellees still contend there was no evidence that Sarah Fish died testate (p. 67 of Brief). They fail to recall that Mr. Sanchez, their own witness, states that Mr. Furman was put in possession of the property "under the will"—"I mean the will of the mother of Jesse Fish" (p. 248 of Record).

Appellees say on page 69 of their brief that the defendant in the court below should have apprised them of their inability to prove title in complainants.

Appellants put in issue the title set up in the bill, and left complainants to make out their case ir that as in all other particulars. They were required by no rule ot pleading to do more.

As to the omission of section 2 of the act of 1829, Laws of Florida, regulating descents, from the brief ot appellants, this was because the section has no application under the facts. The statute contains an express proviso, which is printed with section 10, relating to title derived from the father, and was also omitted from appellants' brief, page 73. This proviso is in these words: "Provided, however, and be it further enacted," section 10, section 11. Thompson's Digest, p. 189.

On page 69 of appellees' brief the contention is made that appellants did not prove that W. J. Sanchez, son of Venancio Sanchez, is the son of Mr. Sanchez's wife, the daughter of Gabriel W. Perpall.

It was not for appellants to prove the extinction of those persons on whom the law cast the title. This must be proved by any person claiming in hostility.

Appellees have fallen into another error in the transposing of the name of the grandfather of the infant Furman on page 69 of the brief. His name is nowhere given as William Gabriel Perpall except in the deposition of Ann Furman, but always as Gabriel W. Perpall. That Mr. Perpall survived his grandson, see testimony of Ann Furman (p. 237 of Record).

A comparison of appellees' brief with the opinion reported by the master to the court will disclose that appellees have deserted numerous contentions in the court below.

Respectfully submitted.

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